KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Telephone: (916) 322-5522
Facsimile: (916) 327-2319
E-Mail: Danae.Aitchison@doj.ca.gov
Danae Aitchison, SBN: 176428

August 9, 2013

The Honorable Vance W. Raye, Presiding Justice
Honorable Associate Justices
Third District Court of Appeal
Stanley Mosk Library and Courts Building
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: Town of Atherton, et al. v. California High-Speed Rail Authority
Court of Appeal of the State of California, Third Appellate District, No. C070877

Dear Presiding Justice Raye:

Respondent California High-Speed Rail Authority (Authority) respectfully submits this supplemental letter brief to address the effect on this appeal of the federal Surface Transportation Board taking jurisdiction over the California High-Speed Train system. Pursuant to the Court's July 8th order, this brief discusses the following:

1. Does federal law preempt state environmental law with respect to California's high-speed rail system? (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.)

   Answer: The Interstate Commerce Commission Termination Act preempts a California Environmental Quality Act remedy in this appeal.

2. Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the trial court or is the preemption jurisdictional in nature? (See *International Longshoremen's Ass'n, AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-391 [90 L.Ed.2d 389]; *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 810; *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280.)

Answer: Preemption of the California Environmental Quality Act in this case is jurisdictional in nature.

This brief also explains that the STB decision is new legal authority relative to the STB's jurisdiction, not improper extra-record evidence being offered on the merits of the CEQA case, and that the STB's jurisdictional decision overlaps geographically with the decisions being challenged in this appeal.

Sincerely,

DANAE J. AITCHISON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Attorneys for Respondent
California High-Speed Rail Authority

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Introduction

The Surface Transportation Board (STB) is the successor to the Interstate Commerce Commission. Pursuant to the Interstate Commerce Commission Termination Act of 1995, or the "ICCTA," Congress vested the STB with exclusive regulatory jurisdiction over railroads involved in interstate commerce. The remedies provided in the ICCTA over rail transportation are exclusive and preempt the remedies provided under federal or state law.

Courts and the STB uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate. By contrast, federal environmental laws like the National Environmental Policy Act, Clean Water Act, and Clean Air Act apply to rail transportation under STB jurisdiction because these laws can be harmonized with the ICCTA. The STB recently determined it has jurisdiction over California's high-speed train system. The ICCTA now preempts any CEQA remedy in this appeal, and the case must be dismissed.

The preemptive effect of the ICCTA on the CEQA remedies at issue in this appeal is jurisdictional in nature. In section 10501(b), Congress removed the right of state courts to adjudicate and provide state-law remedies in those areas that the federal law preempts. Because this

preemption implicates a state court's jurisdiction, the defense can be raised for the first time on appeal. Furthermore, the issue can be addressed for the first time on appeal because the STB's decision is new legal authority and is not improper extra-record evidence directed at the merits of the CEQA case.

The STB's jurisdiction over the high-speed train system, and application of the ICCTA, marks a shift in the applicable regulatory framework for the project. Still, the environmental mitigation discussed in the revised program environmental impact report, and that the Authority adopted in 2010 (and readopted in 2012), will continue to apply to this project. The Authority will work with its federal partners to ensure all environmental mitigation from the program EIR is included in the project moving forward.

Procedural Setting

On March 27, 2013, the Authority filed with the STB a petition for exemption from the prior approval requirements in 49 U.S.C. § 10901 for planned high-speed train construction in the Central Valley and concurrently filed a motion to dismiss on the grounds that the STB lacked jurisdiction over the high-speed train project as a whole. (*California High-Speed Rail Authority-Construction Exemption-in Merced, Madera and Fresno Counties*, Cal., No. FD 35724, 2013 WL 1701795, at *1 (S.T.B. April 18, 2013).) On April 18, 2013, the STB denied the Authority's motion to dismiss, stating it has jurisdiction over the entire high-speed train system, including the proposed Central Valley construction. (*Id.* at *2.)

The STB did not explain the basis for its jurisdiction, however, and instead reserved that explanation for a subsequent decision. (*Id.* at *2.)

On June 13, 2013, the STB issued its decision explaining that it "has jurisdiction over transportation by rail carrier . . . between a place in a state and a place in the same state, as long as that interstate transportation is carried out 'as part of the interstate rail network.'" (*California High-Speed Rail Authority-Construction Exemption-in Merced, Madera and Fresno Counties*, Cal., No. FD 35724, 2013 WL 3053064, at *6, (S.T.B. June 13, 2013).) The decision goes on to explain that the STB has jurisdiction over the high-speed train system because its interconnectivity with Amtrak makes it part of the interstate rail network. (*Id.*, at *6.)[1] The STB found that the high-speed train system "would have extensive interconnectivity with Amtrak, which has long provided interstate passenger rail service, and is therefore part of the interstate rail network." (*Id.* at *6.) The STB thus determined it has jurisdiction over the entire high-speed train system.[2]

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[1] The June 13, 2013, STB decision discusses the programmatic EIR/EISs prepared by the Authority and the Federal Railroad Administration that the agencies used to establish the high-speed train system, which is depicted in a map in Appendix B of the paper copy of the decision submitted to the Court and served on June 26, 2013. (*Id.* at *4-5 and fn. 49; *id.*, Appendix B; see also Appendix C Environmental Memorandum, * 26-28 [discussing first-tier EIR/EISs, including 2010 Revised Final Program EIR].) The high-speed train system map is not reproduced in the Westlaw version of the June 13th decision.

[2] Following the jurisdictional portion of the decision, the STB analyzed the Merced to Fresno project that the Authority has proposed for construction, exempted the construction from further regulation, and authorized the construction to proceed with various conditions. (*Id.* at * 9-13.)

The STB decision became effective on June 28, 2013. (*Id.* at *16.) No petitions to reopen the proceeding were filed by the July 3, 2013, deadline. (*Id.* at *16.) The limitations period for an appeal is August 27, 2013. (28 U.S.C. §§ 2321(a), 2342, 2343, 2344.)

ARGUMENT

I. The California High-Speed Train System Is Now Subject to STB Jurisdiction Under the ICCTA, Which Preempts A CEQA Remedy in this Case.

The first question in the Court's July 8, 2013, order asks:

> Does federal law preempt state environmental law with respect to California's high-speed rail system? (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.)

The only state environmental law at issue in this case is CEQA. (Pub. Resources Code, § 21000 et seq.) And the only high-speed train system decisions at issue in this case are the Authority's certification of the Bay Area to Central Valley Revised Final Program Environmental Impact Report (EIR) and its selection of the general route into the Bay Area from the Central Valley. On the limited issues before the Court in this appeal, the ICCTA preempts any CEQA remedy.

In enacting the ICCTA in 1995, Congress abolished the former Interstate Commerce Commission, assigned regulatory responsibilities under the act to the STB, and broadly deregulated the railroad industry. (49 U.S.C. § 10101; see also *CSX Transportation, Inc. v. Georgia Public Service Comm.* (N.D. Ga. 1996) 944 F.Supp. 1573, 1583-84 [discussing the

ICCTA and its underlying policy].) Of the many rail transportation policies Congress articulated in the ICCTA, one of them is "to reduce regulatory barriers to entry into and exit from the industry." (49 U.S.C. § 10101.) The ICCTA "expanded the agency's [STB's] jurisdiction to include certain wholly intrastate rail transportation based upon its relationship to the interstate rail network, endorsing a shift in jurisdiction away from the states." (*California High-Speed Rail Authority-Construction Exemption-in Merced, Madera and Fresno Counties*, Cal., No. FD 35724, 2013 WL 3053064, at *7-8, (S.T.B. June 13, 2013).)

Under the Supremacy Clause of the United States Constitution, laws of the United States are the supreme law of the land. (U.S. Const., art. VI, cl. 2.) "The doctrine of preemption gives force to the Supremacy Clause." (*People. v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 1521.) "[W]hen 'a state statute conflicts with, or frustrates, federal law, the former must give way.'" (*Ibid.*, citing *CSX Transp. v. Easterwood* (1993) 507 U.S. 658, 663.)

There are three types of federal preemption of state law: express preemption, field preemption, and conflict preemption. (*Id.* at pp. 1521-22; see also *CSX Transportation, Inc.*, *supra*, 944 F.Supp. at p. 1580-81.) Where a federal statute contains express preemption language, a court's review focuses on the plain wording of the statute to discern Congressional intent. (*CSX Transp. v. Easterwood*, *supra*, 507 U.S. at p. 664.) Section 10501(b) of the ICCTA includes an express preemption provision:

> The jurisdiction of the Board over—
>
> **(1)** transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> **(2)** the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

(49 U.S.C. § 10501(b), emphasis added.)

This language reflects the traditional federal regulation of railroads engaged in interstate commerce. (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025, 1029 [discussing cases recognizing need to regulate railroads at federal level].) As one federal court observed, "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." (*CSX Transportation, Inc.*, *supra*, 944 F.Supp. at p. 1581.)

Although the ICCTA retains for the states the police powers reserved by the Constitution, this case involves the express preemption of state regulation, not reserved police powers. (*City of Auburn*, *supra*, at p. 1029 [discussing legislative history of the ICCTA]; *Jones v. Union Pacific*

Railroad Company (2000) 79 Cal.App.4th 1053, 1058-59 [same].)[3] The question here is whether the ICCTA's express preemption language preempts CEQA and CEQA remedies. The federal courts and the STB have answered this question in the affirmative, and California appellate courts recognize that affirmative answer.

A. Federal Courts Have Consistently Held That The ICCTA Preempts State Environmental Preclearance Laws.

Federal courts have consistently held that the ICCTA preempts state environmental preclearance laws. The federal cases establish a preemption analysis for state regulation of railroads in interstate commerce that distinguishes between facially preempted state regulation and state regulation that may be preempted "as applied." (*Adrian & Blissfield Railroad Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 539-540.) There are two types of facially preempted state regulation:

> (1) "any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized" and
>
> (2) "state or local regulation of matters directly regulated by the Board such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions,

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[3] In the ICCTA, Congress has legislated in an area with significant federal presence, i.e., railroads, and therefore the typical presumptions about narrowly construing the scope of federal preemption of state law are less strong. (*Elam v. Kansas City Southern Railway Co.* (5th Cir. 2011) 635 F.3d 796, 804; *Miller v. Bank of America, N.A.* (2009) 170 Cal.App.4th 980, 985.)

> and other forms of consolidation; and railroad rates and service."

(*Id.* at p. 540 citing *CSX Transp., Inc. – Petition for Declaratory Order*, No. FD 34662, 2005 WL 1024490 at * 3 (S.T.B. May 3, 2005); *New Orleans & Gulf Coast Railway Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332; *Green Mountain Railroad Corporation v. State of Vermont* (2d Cir. 2005) 404 F.3d 638, 642.)

The federal courts consider these two types of state regulations or actions to be "*per se* unreasonable interference with interstate commerce," and that is the end of the inquiry. (*Id.* at p. 540.) There is no need to analyze the reasonableness of the burden imposed by the particular state action or regulation because the analysis is directed at the act of regulation itself. (*Ibid.*) State regulations or actions that do not fall into either of the two types of actions that are preempted on their face may nonetheless be preempted "as applied" based on an assessment of whether the action would prevent or unreasonably interfere with rail transportation. (*Ibid.* citing *Barrois*, *supra*, 533 F.3d at p. 332.)

In *City of Auburn*, the Court of Appeals for the Ninth Circuit upheld an STB declaratory order finding the ICCTA preempted state and local environmental review laws pertaining to the reopening of a railroad line in Washington. (*Id.* at pp. 1031, 1033.) The railroad sought STB approval to reacquire a portion of the 229-mile Stampede Pass rail line and reestablish rail service, with plans to repair and replace track and make other rail improvements. (*Id.* at p. 1027-28.) The railroad initially applied for permits from local authorities but later contended that the ICCTA preempted local environmental review requirements. (*Id.* at p. 1028.)

The City of Auburn challenged the STB's approval of the railroad's proposal and its assertion that the ICCTA preempted state and local environmental review and permitting laws, arguing Congress intended to preempt only economic regulation. (*Id.* at pp. 1028-29.) The Ninth Circuit disagreed, reasoning that the broad language of section 10501(b)(2) blurred the lines between economic and environmental regulation because the power to impose environmental requirements, "will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." (*Id.* at p. 1031.) The court further explained that:

> We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it. [Citation and footnote omitted.] Because congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, we affirm the STB's finding of federal preemption.

(*Id.* at p. 1031.) *City of Auburn* thus interprets the ICCTA to explicitly preempt state and local environmental review laws for railroads under STB jurisdiction.

The federal Court of Appeals for the Second Circuit reached a similar result in *Green Mountain Railroad Corporation v. State of Vermont*, *supra*, 404 F.3d 638, holding that the ICCTA preempted Vermont's environmental land use law because it was an environmental pre-clearance requirement. (*Id.* at p. 639.) Citing *City of Auburn*, the court held the Vermont statute unduly interfered with interstate commerce by giving a

local body the ability to deny the railroad the right to construct its facilities. (*Id.* at pp. 642-643.)

Other federal circuit courts of appeal are in accord. (*Adrian & Blissfield Railroad Co.*, *supra*, 550 F.3d at pp. 539-40 [recognizing two types of facially preempted state regulation]; *New Orleans & Gulf Coast Ry. Co. v. Barrois*, *supra*, 533 F.3d at p. 332 [recognizing two types of facially preempted state regulation same]; *New York Susquehanna and Western Railway Corp. v. Jackson* (3d Cir. 2007) 500 F.3d 238, [concurring in STB decisions and Second Circuit Court of Appeals in *Green* case]; *Association of American Railroads v. South Coast Air Quality Management District*, *supra*, 622 F.3d at pp. 1097-98 [affirming preemption discussed in *City of Auburn* and applying second type of facial preemption to find air district regulation of railroad activity preempted].) Railroads under the jurisdiction of the STB are therefore not subject to remedies imposing state or local environmental pre-clearance requirements because such regulation represents, "per se unreasonable interference with interstate commerce." (*New Orleans & Gulf Coast Ry. Co.*, *supra*, 533 F.3d at p. 332 citing *CSX Transp. Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, pp. 2-3; see also *Elam*, *supra*, 635 F.3d at p. 805 [quoting ICCTA legislative history for the point that the federal scheme of railroad regulation is intended to be "completely exclusive"].)

B. The STB Holds That The ICCTA Preempts CEQA.

While no federal appellate decision has addressed whether the ICCTA preempts CEQA specifically, the STB has held that the ICCTA

preempts CEQA and CEQA remedies.[4] In response to a declaratory order petition, the STB held that the proponent of a 200-mile high-speed train project between Victorville, California and Las Vegas, Nevada would be an interstate rail carrier and explained that the DesertXpress project qualified as transportation by a rail carrier and "[a]ccordingly, the Board has exclusive jurisdiction over the planned new track, facilities, and operations and the Federal preemption under section 10501(b) attaches." (*DesertXpress Enterprises, LLC – Petition for Declaratory Order*, No. FD 34914, 2007 WL 1833521, at *3 (S.T.B. June 25, 2007).) Federal environmental statutes such as NEPA, the Clean Air Act, and Clean Water Act would apply to the project, and the STB explained that state and local agencies and the public would have an opportunity to participate in the NEPA process. (*Id.*) Citing *City of Auburn*, the STB held "state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted." (*Id.*)

An earlier STB decision involving the City of Encinitas reached a similar holding. (*North San Diego County Transit Development Board – Petition for Declaratory Order*, No. FD 34111, 2002 WL 1924265, *2-5 & fn.7 (S.T.B. August 19, 2002) [CEQA and state Coastal Act permit requirements preempted for railroad under STB jurisdiction]; accord *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal.

[4] The federal appellate decisions discussed in section IA, *supra*, cite to and rely on the decisional authority of the STB. (See *Association of American Railroads*, *supra*, 622 F.3d at p. 1097; *Green*, *supra*, 404 F.3d at p. 642; *New Orleans & Gulfcoast Railway*, *supra*, 533 F.3d at p. 332; *New York Susquehanna and Western Railway Corp.*, *supra*, 500 F.3d at pp. 253-54.)

Jan. 14, 2002) 2002 WL 34681621 at * 4; see also *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, No. FD 33971, 2001 WL 458685 (S.T.B. April 30, 2001) [Massachusetts Conservation Commission review process preempted].) These STB decisions thus specifically support that the ICCTA preempts any CEQA remedy in this appeal.

C. California Courts Also Recognize That The ICCTA Preempts State Environmental Pre-Clearance Laws.

Two published California appellate cases have considered the scope of federal preemption of state law under the ICCTA. Although neither case involves CEQA, both cases recognize the ICCTA's facial preemption of state environmental review laws as discussed in federal cases.

In *People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, the Court of Appeal for the First District considered whether the ICCTA preempted a Public Utilities Commission (PUC) general order regulating railroad blocking of at-grade crossings. A railroad was convicted of a misdemeanor violation of the PUC general order. (*Id.* at p. 1516.) The Court of Appeal reversed, holding that the ICCTA preempted the PUC general order. (*Id.* at p. 1531.) In reaching its holding, the Court recognized the two types of facially preempted state regulations discussed in federal case law: (1) state environmental pre-clearance or permitting requirements; and (2) state regulation of matters directly regulated by the STB including rail operations. (*Id.* at p. 1528 citing *Adrian & Blissfield R. Co., supra,* 550 F.3d at p. 540.) The ICCTA preempted the PUC general order because it was regulating railroads

operations, an area regulated by the STB, and thus was the second of the two types of facially preempted state laws. (*Id.* at pp. 1528-29, 1531.)

In *Jones v. Union Pacific Railroad, supra*, 79 Cal.App.4th 1053, the Court of Appeal for the Fourth District considered whether the ICCTA preempted two homeowners' state-law claims against a railroad for nuisance, other torts, and monetary damages. The claims alleged the railroad created excessive train noise, including harassing horn blowing, and excessive fumes from idling trains that served no legitimate purpose. (*Id.* at pp. 1057-58.) The trial court granted the railroad's motion for summary judgment, finding the ICCTA preempted the state-law claims. (*Id.* at p. 1058.) The Court of Appeal reversed, holding that whether the ICCTA preempted the state-law claims presented a triable issue of fact as to whether the claims were within the State's police power. (*Id.* at pp. 1059-61.) The Court of Appeal distinguished *City of Auburn* as a case involving state environmental regulations preempted under the ICCTA, whereas the complaint at issue in *Jones* alleged harassing behavior with no legitimate purpose. (*Id.* at p. 1060.) Like *People v. Burlington Northern Santa Fe Railroad, Jones v. Union Pacific Railroad* recognizes the ICCTA's preemption of state environmental review requirements.

D. Because No CEQA Remedy Is Available In This Case, It Must be Dismissed.

The federal and state case law authorities discussed above uniformly hold or recognize that the ICCTA preempts state environmental pre-clearance laws. And on two occasions (DesertXpress and North San Diego County Transit Development Board), the STB held that CEQA is one such

environmental pre-clearance law the ICCTA preempts. Now that the STB has determined that the high-speed train system is under its jurisdiction and subject to the regulatory framework in the ICCTA, the ICCTA preempts CEQA in this case. (*City of Auburn, supra*, 154 F.3d at p. 1031; 49 U.S.C. § 10501(b).) No CEQA remedy is available, and the Authority therefore respectfully requests that the Court dismiss this case. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

II. The Preemptive Effect of the ICCTA on Appellants' CEQA Claims Is Jurisdictional in Nature.

The second question in the Court's July 8, 2013, order asks:

> Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the trial court or is the preemption jurisdictional in nature? (See *International Longshoremen's Ass'n, AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-391 [90 L.Ed.2d 389]; *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 810; *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280.)

Under section 10501(b), the ICCTA's preemption of CEQA is jurisdictional in nature.

A. The Preemptive Effect of the ICCTA Affects The Court's Subject Matter Jurisdiction.

The preemptive effect of the ICCTA on Appellants' CEQA claims is jurisdictional in nature because in California "preemption implicates subject matter jurisdiction and cannot be waived." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 956 citing *Detomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 520,

fn.1.) California courts therefore regularly consider federal preemption defenses to state law claims that are raised for the first time on appeal. (*Consolidated Theaters, Inc. v. Theatrical Stage Emp. Union, Local 16* (1968) 69 Cal.2d 713, 721 & fn.8 [jurisdictional defects due to federal preemption may be raised for first time on appeal]; *Readylink Healthcare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166, 1175 ["a party may raise a constitutional issue, like preemption, for the first time on appeal"]; *Steele v. Collagen Corp.* (1997) 54 Cal.App.4th 1474, 1489 ["preemption is a matter of subject matter jurisdiction that cannot be waived"]; *Barnick v. Longs Drug Stores, Inc.* (1988) 203 Cal.App.3d 377, 379-80 [party can raise jurisdictional defense such as federal preemption for first time on appeal]; *Molina v. Retail Clerks Union & Food Employers Benefit Fund* (1980) 111 Cal.App.3d 872, 879 [allowing federal preemption defense to be raised for first time on appeal where application of state law was preempted by federal law and facts on preemption were undisputed].)[5]

Appellants cite *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, for the argument that federal law preemption is a waivable affirmative defense that must be raised in the trial court. (Letter from Stuart Flashman to Hon. Vance Raye, June 28, 2013.) *Karlsson* is distinguishable. The federal law preemption defense being raised for the first time on appeal in that case involved a federal law (the National Traffic and Motor Vehicle Safety Act) that specifically provided for state court jurisdiction over non-conflicting state-law products liability claims. (*Id.* at

[5] The Authority identified lack of subject matter jurisdiction as an affirmative defense in both answers. (1 JA 47 (*Atherton 1*); 3 JA 800 (*Atherton 2*).)

pp. 1206-08, 1236.) "Where jurisdiction resides in both the federal and state courts, whether federal law applies is a choice of law question. Choice of law preemption issues may be waived." (*Id.* at p. 1236; accord *Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 849-850.) In contrast, under the ICCTA the remedies are exclusive and eliminate state court jurisdiction to provide the CEQA remedy being sought in this appeal. (49 U.S.C. § 10501(b); *City of Auburn, supra,* 154 F.3d at p. 1031; *Adrian & Blissfield Railroad Co., supra,* 550 F.3d at p. 540; see also 49 U.S.C. § 11704 (d)(1) [allowing state court jurisdiction over civil actions to enforce STB order requiring payment of damages by rail carrier providing transportation subject to STB jurisdiction]; 49 U.S.C. § 11706 (d)(1) [allowing state court jurisdiction over civil actions on receipts and bills of lading].)

Other courts addressing the ICCTA and state court subject matter jurisdiction have similarly concluded that a state court lacks jurisdiction to adjudicate the merits of the state-law claim that it finds preempted by the ICCTA. (*In the Matter of Metropolitan Transportation Authority* (2006) 32 A.D.3d 943, 946 [823 N.Y.S.2d 88] [ICCTA placed exclusive jurisdiction over proposed condemnation of rail tracks in STB and New York courts lacked subject matter jurisdiction]; *In re Application of Burlington Northern Railroad Co. v Page Grain Co.* (Neb. 1996) 545 N.W.2d 749, 751 [ICCTA placed regulation of rail service agencies under exclusive jurisdiction of STB and Nebraska courts lacked subject matter jurisdiction]; see also *B&S Holdings, LLC v. BNSF Railway Co.* (E.D. Wash. 2012) 889 F.Supp.2d 1252, 1256-58 [district court denied motion to remand state-law

adverse possession claim to state court and dismissed, finding the ICCTA completely preempted state claim]; *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal. Jan. 14, 2002) 2002 WL 34681621 at * 4 [district court denied motion to remand CEQA claim to state court and dismissed, finding the ICCTA vests jurisdiction over such claims in STB].)

B. The Preemptive Effect of the ICCTA Affects The Court's Jurisdiction Because The Court Has No Jurisdiction To Order A Remedy That Congress Has Prohibited.

The preemptive effect of the ICCTA on the Appellants' CEQA claims is also jurisdictional in nature because, if the Court finds preemption, it lacks jurisdiction to provide the requested state-law remedy.

The concept of jurisdiction in California involves a court's power over the subject matter, the parties, and its inherent authority to hear and determine a case. (See *Varian Medical Systems, Inc., v. Delfino* (2005) 35 Cal.4th 180, 196 [discussing subject matter jurisdiction].) In converse, "[l]ack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) A court lacks fundamental jurisdiction "to grant relief that it has no authority to grant," even if it otherwise has jurisdiction over the parties and general subject matter. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 538; *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691.) Any judgment or order by a court lacking jurisdiction over the subject matter, the persons, or because the court granted relief it had no power to

grant, is void on its face. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.)

This Court has inherent authority to determine the scope of its own jurisdiction. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267 citing *Abelleira, supra*, 17 Cal.2d at pp. 302-303.) The Court not only can, but must, determine whether the ICCTA preempts the state-law remedies being sought in this appeal. (*Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 740; see also *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280 [Ohio court had jurisdiction to consider merits of ICCTA preemption defense of state-law claim against railroad].) This is the case because assuming Congress has preempted the very state-law remedies Appellants seek in this case – a writ of mandate and injunctive relief – this Court lacks jurisdiction to provide such remedies. (49 U.S.C. § 10501(b); *City of Auburn, supra*, 154 F.3d at p. 1031; *Adrian & Blissfield Railroad Co., supra,* 550 F.3d at p. 540; 3 JA 690-91; 3 JA 657-664; Appellants' Opening Brief, p. 40; Appellants' Reply Brief, p. 24.) A CEQA remedy in this case would be void for lack of jurisdiction if the ICCTA preempts CEQA here. (*In re Marriage of Thomas* (1984) 156 Cal.App.3d 631, 636 citing *Kalb v. Feuerstein* (1940) 308 U.S. 433, 439.) And since an action that was originally based on a justiciable controversy cannot be maintained on appeal if subsequent occurrences eliminate an effective remedy, this case must be dismissed. (*Consolidated Vultee Air Corp. v. United Automobile* (1946) 27 Cal.2d 859, 862-863.)

These authorities are consistent with *International Longshoremen's Assn. AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-91. In *Davis*, the United

States Supreme Court analyzed whether the preemptive effect of the National Labor Relations Act (NLRA) on Alabama state-law claims was a waivable affirmative defense or was jurisdictional. (*Id.* at p. 381-82.) The Court concluded that because the federal preemption defense under the NLRA "is a claim that the state court has no power to adjudicate the subject matter of the case . . . it must be considered and resolved by the state court." In other words, there could be no waiver of the federal preemption defense because, "where state law is pre-empted by the NLRA under *Garmon* and our subsequent cases, the state courts lack the very power to adjudicate the claims that trigger preemption." (*Id.* at p. 398; see also *Hughes*, *supra*, 215 Cal.App.3d at pp. 849-850 [discussing *Davis* and "choice of law" preemption versus jurisdictional preemption when Congress provides exclusive federal jurisdiction over a claim].)

Elam v. Kansas City Southern Railway Co., *supra*, 635 F.3d 796, is also consistent. *Elam* involved simple negligence and negligence per se claims two individuals filed in state court against a railroad. (*Id.* at p. 801-802.) The Court of Appeals concluded that the ICCTA preempted the state law negligence per se claim and that the nature of preemption was sufficiently comprehensive that it conferred federal court jurisdiction over the matter. (*Id.* at p. 805-806 discussing ICCTA legislative history.) The simple negligence claim was not preempted. (*Id.* at p. 814.) The Court of Appeals thus dismissed the negligence per se claim and remanded to the state court only the simple negligence claim. (*Id.* at p. 814.) *Elam* thus reinforces that if a state-law claim is preempted by the ICCTA, the state court lacks jurisdiction to consider it on the merits.

C. The STB's Jurisdictional Decision is New Legal Authority That Can Be Raised For the First Time On Appeal.

An alternative basis for this Court to reach the preemptive effect of the ICCTA for the first time on appeal is that the STB decision is new authority, not inappropriate extra-record evidence as Appellants have suggested. (Letter from Stuart Flashman to Hon. Vance Raye, June 28, 2013.) The STB is an expert regulatory agency Congress created to enforce the ICCTA, with a three-member "independent adjudicatory panel" for decision making. (H.R.Rep. No. 104-311, 1st Sess., p. 111 (1995); 49 U.S.C. § 701.) Congress empowered the STB to issue final decisions and orders on matters that come before it. (49 U.S.C. § 721; 5 U.S.C. § 554(e).) These final decisions and orders are reviewable under the Hobbs Act exclusively by the federal courts of appeals to ensure uniform interpretation of the law that the STB is responsible for enforcing. (28 U.S.C. § 2342; *King County v. Rasumussen* (9th Cir. 2002) 299 F.3d 1077, 1089; *CE Design, Ltd. v. Prism Business Media, Inc.* (7th Cir. 2010) 606 F.3d 443, 450 [discussing purpose of Hobbs Act].) As such, the STB decision constitutes new legal authority that eliminates the jurisdiction of this Court to provide a CEQA remedy. It is not extra-record factual evidence directed at whether the Authority proceeded in a manner required by law or made factual decisions supported by substantial evidence. (*Western States Petroluem Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572-73.)

Moreover, courts can reach arguments raised for the first time on appeal if they are based on new authority that could not have been anticipated during the trial court proceedings. (*People v. Turner* (1990) 50 Cal.3d 668, 703; *In re Guardianship of Steven G.* (1995) 40 Cal.App.4th

1418, 1422-23.) That is the situation here, because the STB issued its decision in June 2013, several years after the trial court proceedings in this case concluded. This provides an independent basis to distinguish *Karlsson*, cited by Appellants, because in that case the main federal case authorities supporting preemption were decided "well before the case went to trial" and therefore the defendant car maker should have raised the preemption issue in the trial court. (*Karlsson*, *supra*, 140 Cal.App.4th 1202, 1236.) And as discussed at length above, the STB decision deprives this Court of subject matter jurisdiction. If the Authority could not bring this development to the attention of the Court, this Court would run the risk of granting relief that the ICCTA preempts.

III. The STB Decision Is Relevant To This Appeal Because its Scope Overlaps With The Scope Of The Revised Final Program EIR.

Finally, Appellants are incorrect in asserting that the STB decision has no relevance to this appeal. (Letter from Stuart Flashman to Hon. Vance Raye, June 28, 2013, pp. 1-2.) The programmatic project at issue in this appeal is the Authority's decision on a general high-speed train route into the Bay Area from the Central Valley, the Pacheco Pass network alternative. (Supplemental Administrative Record (SAR) 000003-7.) The Authority's decision in favor of the Pacheco Pass network alternative overlaps with the STB's decision taking jurisdiction over the entire high-speed train system. (Compare SAR000291 [map of selected Pacheco Pass Network Alternative] and STB, App. B.) The high-speed train system as a whole, including the route from the Central Valley into the Bay Area, is

now under the jurisdiction of the STB. The decision establishing STB jurisdiction is therefore plainly relevant to this appeal.

CONCLUSION

The STB's decision concluding it has jurisdiction over the entire high-speed train system fundamentally affects the regulatory environment for the project moving forward. The Authority, and the high-speed train system, are now subject to the ICCTA. Under 49 U.S.C. section 10501(b), the ICCTA preempts CEQA in this case and there is no available CEQA remedy. The Authority therefore respectfully requests that the Court of Appeal dismiss this case.

Sincerely,

DANAE J. AITCHISON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

DJA:
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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Supplemental Letter Brief uses a 13 point Times New Roman font (except the cover letter in 12 point Times New Roman font) and contains 6105 words.

Danae J. Aitchison

DANAE J. AITCHISON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL and ELECTRONIC MAIL

Case Name: ***Town of Atherton et al. v. California High-Speed Rail Authority***

Case No.: **Court of Appeal, Third Appellate District Case No. C070877**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 9, 2013**, I served the attached **RESPONDENT'S SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533

California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102
(4 Copies)

Honorable Michael Kenny
c/o Clerk of Court, Dept. 31
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 9, 2013**, at Sacramento, California.

Ruthann Reshke
Declarant

Signature

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